Options
for the
implementation
of

HUMAN RIGHTS LEGISLATION

A GREEN PAPER

OCTOBER, 1986

Yukon
Justice

FOREWORD

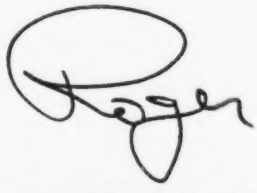
In my travels around the Yukon I have heard many people say "we need public education on human rights." This government agrees. Informing people about discrimination helps to prevent it. Talking to people about the rights of individuals helps to promote a better understanding between citizens.

We also need good legislation. And good legislation must be responsive to community needs. It must involve Yukoners. And the process must be accessible to the victims of discrimination. To do this, we need your input.

The Government of Yukon believes that we have a responsibility to all Yukoners. We believe that the present Fair Practices Act does not adequately help the people who have suffered from discrimination. And we believe that new legislation is necessary to address these needs.

This is the second discussion paper on human rights released by this Government. The first, the ***White Paper,*** was released in July, and talked about the principles of human rights. This ***Green Paper*** will discuss some implementation systems for human rights administration.

I have appreciated meeting with Yukoners and talking about the ***White Paper.*** I now encourage your input on this ***Green Paper.***



The Honourable R.S. Kimmerly
Minister of Justice
Government of Yukon

October, 1986

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INTRODUCTION

In July of this year, the Government of Yukon released a discussion paper, ***The Principles of Human Rights Legislation — A White Paper.*** It outlined and introduced the principles of Human Rights Legislation and asked for public response and submissions.

The purpose of this ***Green Paper*** is to outline some possible implementation systems for human rights legislation, and to seek public input as to which option is the most desirable.

The implementation of Human Rights can take many forms. In British Columbia the provincial government uses a ***Human Rights Council,*** which investigates and decides on the merit of complaints, and then makes judicial rulings. All other provinces use some form of a ***Human Rights Commission,*** which investigates complaints, and attempts conciliation, but has no authority to rule settlements. (If the case is not resolved, it is referred to an impartial quasi-judicial board). In the Yukon, as in the Northwest Territories, we do not have a Human Rights Act. Instead, we use a Fair Practices Act, which is administered through the Government's Labour Offices.

Some of the following suggestions come from existing Human Rights Laws (notably the Canadian Human Rights Act) while others take into account the Yukon's small population.

We encourage you to comment on this paper. Together we can develop Human Rights Legislation that works for the Yukon.

I. THE HUMAN RIGHTS ACT:

How It Would Be Administered

Many possibilities exist for administering a Human Rights Act. The following three models indicate some possible options for implementation. The various components of these options are interchangeable, so that, for example, public response may encourage the administrative component of Option #2, with the public education component from Option #3.

When developing these models, we considered the structures used presently by provincial and federal governments. Some factors to consider with the following options have been identified, but the Government encourages you to identify any other factors you feel are important.

OPTION #1

The Government could administer the Human Rights Act using the same, or similar, process as presently used for the Fair Practices Act.

The present Fair Practices Act is administered by the Labour Services Office of the Consumer, Corporate & Labour Affairs Branch of the Department of Justice. The Labour Service officers act as investigators for the Fair Practices Act when there is a complaint.

In this Option the Human Rights Act would be administered through the Consumer, Corporate and Labour Affairs Branch.

The complaint procedure would remain similar to what is now used. At present, a written complaint is filed and, if covered by the Act, is investigated. After the investigation, the complaint is either dismissed by the officer (there is no appeal at this stage), or the complaint is substantiated and the officer attempts to conciliate some kind of solution between the two parties.

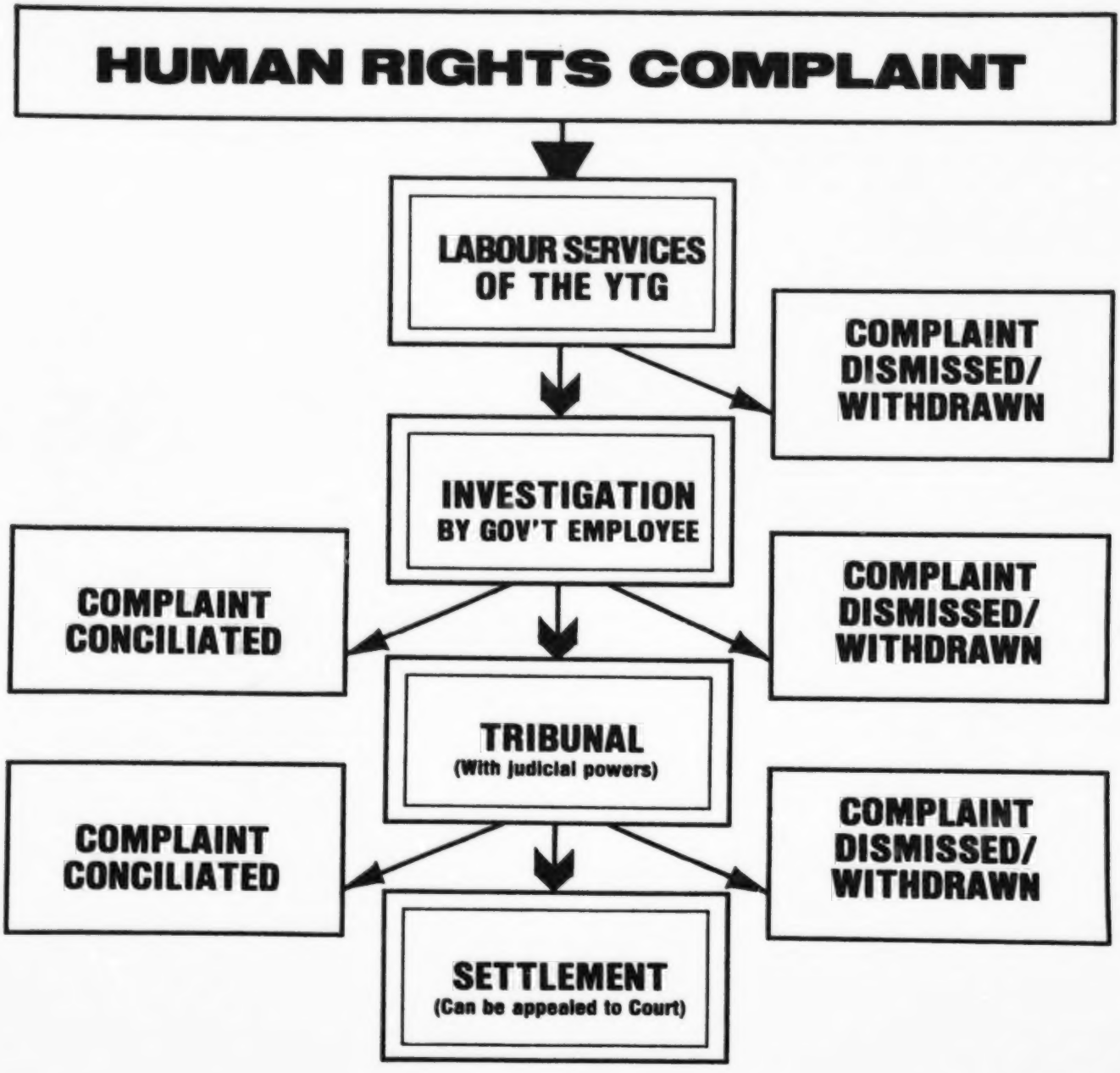
If the officer is not successful at conciliating a mutual resolution, then she/he recommends that the case continue to a one-person Tribunal (presently a lawyer who is appointed by the government). The Tribunal holds a hearing, makes a decision and effects a settlement. If necessary, the Tribunal officer can seek a court -binding order for the settlement, and this order can be appealed by either party to the courts. However, the decision of a Judge, once the case has gone that far, is not subject to appeal.

Factors: At present, there is no mandate for public education about discrimination.

If the Human Rights Act was administered as the Fair Practices Act is, the investigator (an employee of the government) would be in the position of investigating any claims against the government. At present, complaints against the Government of the Yukon are handled by the Canadian Human Rights Commission, but that body is eager to hand the responsibility over to the territorial government.

This Option does not involve the input of ***citizens*** either through a Commission or a Citizen's Board. This could leave the Human Rights Act subject to political or government intervention.

OPTION #1


HUMAN RIGHTS COMPLAINT
LABOUR SERVICES OF THE YTG
COMPLAINT DISMISSED/ WITHDRAWN
INVESTIGATION BY GOV'T EMPLOYEE
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
TRIBUNAL (With judicial powers)
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
SETTLEMENT (Can be appealed to Court)

OPTION #2

This second option could see the Human Rights Act being administered under the Department of Justice, through a Human Rights Office that handles its own investigations and mandate, and takes direction from a Board of Citizens.

The Human Rights Office would be under the responsibility of the Deputy Minister of Justice, and the government funds would be administered this way. However, direction, concerning the office's mandate and handling of complaints would come from a *citizens' board* (members of the public at large appointed by cabinet or a committee of the Legislative Assembly). This citizens' board could be called a Human Rights Commission or a Human Rights Board. Honorariums would be paid to Board members for time spent in meetings. Employees of the Human Rights Office would be government employees, but could have a special status which would maintain a separation from other civil servants, to allow for investigations of government. There would be a two person staff. One, an intake counselor/clerical person, would screen calls and assist in preparing formal complaints. The other would be a Director, who would investigate complaints, attempt a conciliation, and, if necessary, refer the case to the citizens' board for further consideration.

The Board would review the complaints that could not be voluntarily settled, and could either attempt conciliation again or refer the case to an impartial arbitrator for an 'Inquiry' (similar to the Tribunal Officer presently used with the Fair Practices Act.)

The decision of the Inquiry would have a court order status and would be appealable through the courts. Complaints could be voluntarily withdrawn at any time. The Human Rights officer, or the Board, would follow the complaint to the Inquiry stage.

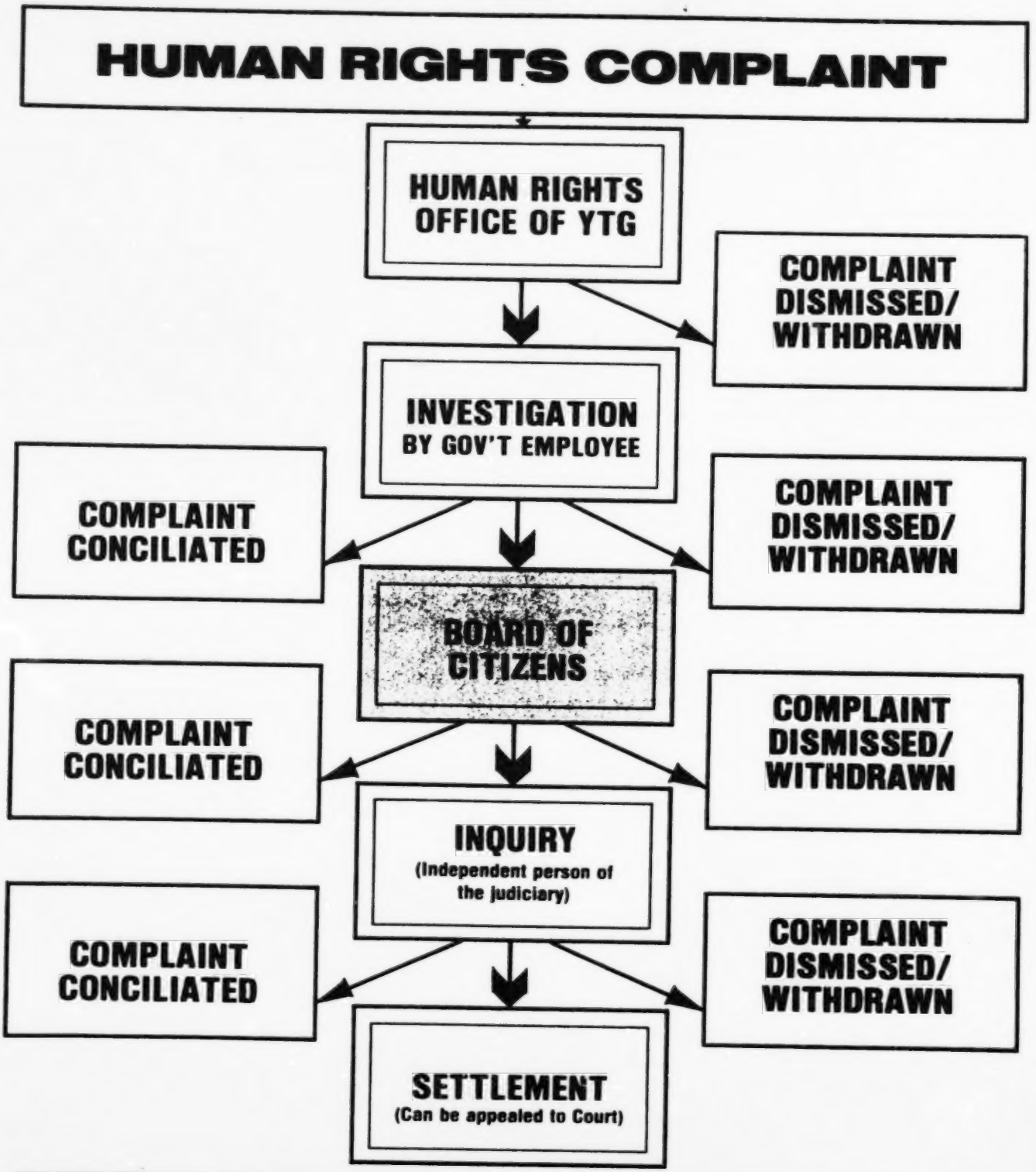
Factors: The Human Rights Office would still be within government and therefore potentially subject to intervention and the perception of bias.

The *citizens' board* would be responsible for overseeing the office and reviewing complaints but would have no "pro-active" mandate. It would give direction and review complaints, thereby including the community in the Human Rights process. There would be a mandate for public education on human rights.

A single-person Inquiry is more reflective of the Yukon's population base than a panel of arbitrators usually used in the provinces.

The method of appointing the citizens' board and the Inquiry Officer would have to be carefully considered. Both could be done through a committee of all the parties in the Legislative Assembly, or could be done by the government of the day. The individuals could be nominated, or appointed, based on: a) their understanding of judicial procedures; b) their respect in the community; c) their representation of the population as a whole, or many other considerations.

OPTION #2


HUMAN RIGHTS COMPLAINT
HUMAN RIGHTS OFFICE OF YTG
COMPLAINT DISMISSED/ WITHDRAWN
INVESTIGATION BY GOV'T EMPLOYEE
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
BOARD OF CITIZENS
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
INQUIRY (Independent person of the judiciary)
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
SETTLEMENT (Can be appealed to Court)

OPTION #3

In this option the Human Rights Act would be administered through a Human Rights Commission which handles its own budget, mandate and office, similar to the structure used in most jurisdictions in Canada.

The Commission would receive monies from the Government and would administer it themselves, accounting for their expenditures. The Commission would be a citizens' board (as in Option #2) or a quasi-judicial board (as is used in British Columbia and made up of members of the judicial community). The Commission would be responsible for public education which would include a mandate to promote human rights principles in the Yukon. The Commission would have the responsibility for its own staff.

Inquiries or complaints would go directly to the Commission Office, and an intake counselor would screen the calls and give general information. The Director would do the investigation, and give a report to the Human Rights Commission. The difference between this and Option #2 is that people would not be going to a government office, but an ***independent*** office.

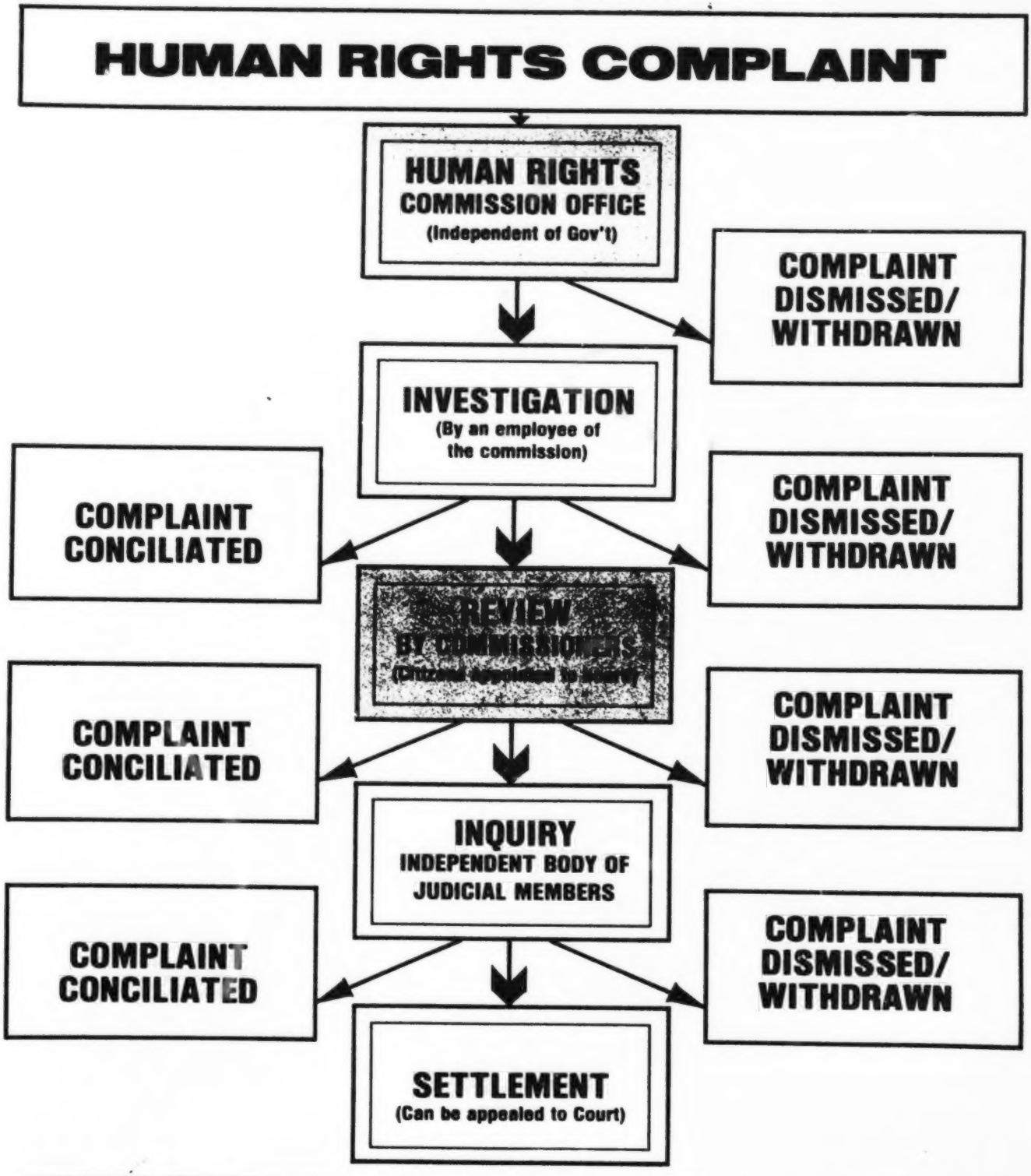
As in Option #2, the Commission would review the investigation and either dismiss it, or request that the Director proceed with conciliation. If the conciliation was unsuccessful, the Commission would order an Inquiry, and "bring" the complaint to a panel of one or more impartial arbitrators who have not been previously involved in the case. The decision of the arbitrators would equal a court order, and could be appealed to court.

Factors: Unlike Option #1 or #2, the Commission would be a separate body from government. The Commissioners would be citizens appointed from the community and could develop their own policies.

Honorariums for the three or so Commissioners may increase with their added time. Public education would be an important mandate. The Commission could also undertake relevant research into areas of concern in the community, for example, Pay Equity or Affirmative Action programs. This option is the most similar to the other jurisdictions.

The Commission could not, (according to case law) act as an arbitrator itself. It needs to have an impartial Inquiry, as suggested in all three options, in order to maintain fairness.

OPTION #3


HUMAN RIGHTS COMPLAINT
HUMAN RIGHTS COMMISSION OFFICE
(Independent of Gov't)
COMPLAINT DISMISSED/ WITHDRAWN
INVESTIGATION
(By an employee of the commission)
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
REVIEW
BY COMMISSIONERS
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
INQUIRY
INDEPENDENT BODY OF JUDICIAL MEMBERS
COMPLAINT CONCILIATED
COMPLAINT DISMISSED/ WITHDRAWN
SETTLEMENT
(Can be appealed to Court)

II. WHAT HAPPENS IN OTHER JURISDICTIONS?

Commissions: What Are They?

Many questions have arisen over the last year about what Commissions are, and what they do. Gathering information from Human Rights Commissions across the country, Commissions seem to have four basic duties:

— to investigate, or order an investigation of, a complaint.
— to conciliate a voluntary resolution.
— to refer a case to an ***Inquiry*** if the case cannot be resolved.
— to undertake research and educational programs.

Commissions were set up to avoid the time and expense of going to the courts for every case of discrimination. Often the two parties involved have a misunderstanding and a simple remedy can be found which is agreeable to both of them. It is the Commission's job to try and find that middle ground. This is the process called ***conciliation.*** A Commission can, if need be, refer a case to an ***Inquiry*** if it cannot be settled through conciliation.

But it is also a Commission's job to educate the public about discrimination, and it is commonly accepted that education is an essential tool for preventing discrimination.

Commissions are most often 'arms-length' from government, and they are made up of citizens from different backgrounds and communities. Usually they are appointed by the Government (sometimes through a committee of the Legislative Assembly) because of their commitment or involvement in community work. Different provinces have different numbers of Commissioners. Ontario has eleven, and Prince Edward Island has three. It seems consistent with the population of the Yukon to have a three-person Commission or Board of Citizens to handle discrimination complaints.

It is important to realize that a Commission does not have the power to impose a settlement on anyone. In fact, a Commission is more like a ***conciliator*** than an arbitrator. The only power it usually has is to refer a difficult case to an Inquiry or Tribunal, and this impartial body would hold hearings and reach a decision in complete independence from the Commission.

Compaints and Investigations

The first step in a complaint process is when someone feels they have been discriminated against and calls or visits a Human Rights Office. Judging from the experience of Human Rights Commissions across Canada, there are many calls and visits, and few of them become formal complaints.

If, after speaking to the office, the individual has reasonable grounds to believe they have been discriminated against, then they may choose to file a formal complaint.

This is usually done by filling in a form, or asking the Commission to fill in a form for them. If the complaint is filed by someone other than the individual or group who is alleged to be the victim of discrimination, the Commission may refuse to accept the complaint, unless the victim consents.

The person filing the complaint is called the

"complainant", and the person alleged to have discriminated is called the "respondent".

After a formal complaint is made, a copy of the complaint is sent to the "respondent" (usually within 30 days) so that they may respond. With most Human Rights Commissions every formal complaint is investigated.

Most existing Human Rights laws include a clause which protects the person filing a complaint from 'reprisal'. This means that an employer could not fire, or threaten to fire, someone because they filed a complaint against them. It also means that someone could not be fired if they refused to take part in a discriminatory practice of an employer.

The ***investigation*** of a formal complaint is carried out by an investigating officer. The investigator's mandate is not to represent the complainant, nor the respondent, but to determine the facts of the case. From here, the investigator would assess the merits of the complaint and make a report, which again would be available to everyone involved.

Unlike court cases, which can take months or years to complete, Commissions usually have a time frame of weeks, or just a few months, in which to act upon a complaint.

During the investigation, an officer may need to obtain copies of documents or evidence that is deemed necessary to determine the facts of the case. In some investigations, search warrants may be obtained to inspect evidence, but in all Human Rights Laws confidentiality is strictly maintained.

Many laws, as well as Human Rights Laws, contain a section which gives investigating officers access to search warrants. For example, Employment Standards Officers, Territorial Conservation Officers, and Health and Safety Officers all have the powers to inspect a place or a document when doing an investigation. All of the investigations, however, must be done at a reasonable time of day and any documents must be photocopied and returned within a limited time. The Government proposes to include similar provisions in the Human Rights Act.

If, during the investigation, someone willfully and actively obstructed the investigator or the Inquiry from carrying out their responsibilities under the legislation, they could be found guilty of an offense and fined. Similar fines are found in other investigation procedures.

In most human rights laws, employers are also considered responsible for the discriminatory actions of their employees. It is the responsibility of employers and supervisors to inform and educate their employees about Human Rights Laws. However, if the employer did not know that discrimination was happening in their business, they would not usually be considered liable.

It often happens that during the complaint process the people involved may come to an understanding about how to resolve the problem, or the complaint may be withdrawn. At this point a Commission usually ceases any further action.

Conciliation & Inquiries

In other jurisdictions, after completing the investigation, a report would go to the Commission. They may dismiss the complaint as being invalid, or conciliate a voluntary resolution between the two parties. If a settlement is reached, no further action is taken. If the terms of the voluntary settlement are not carried out, the Commission may re-open the case to take further action.

In the rare case that a complaint is not conciliated through the Commission, and since the Commission does not have the authority to ***order*** a settlement, it would refer the case to an Inquiry (sometimes called a Tribunal or an Adjudication Board).

It is interesting to note that in Manitoba

recently of 500 formal complaints, only 15 had to be referred to an Inquiry. All Human Rights Commissions across the country show that few cases actually go to an Inquiry. Most cases are successfully conciliated by the Commission.

The Inquiry officer is usually someone who is independent of the Commission, and has the power, as a Judge does, to make *binding* orders. It is important that the Inquiry or Tribunal officer is impartial to the case, so recently, Human Rights Commissions are suggesting that this person be appointed by the Legislative Assembly, and have no connection with the Commission. If one of the parties is dissatisfied with a decision coming out of an Inquiry, they can appeal it to the courts.

Before the Inquiry, all parties receive notices and are invited to attend. This usually includes the complainant, the respondent, and the Human Rights Commission. Other interested parties may be permitted to participate in the Inquiry, and all proceedings are usually public unless confidentiality is requested.

Based on the evidence presented, the Inquiry may:

i) dismiss the complaint, or

ii) find that the legislation has been violated.

If the complaint is dismissed, the respondent may be awarded costs in their favour. If the complaint is substantiated, most Commissions across Canada can order one or more of the following:

* that the discriminatory practice cease and the respondent makes amends to the victim.
* that compensation be made to any party that has suffered a loss.
* that 'damages' be awarded to any party.
* that a 'special program' such as affirmative action be applied to remedy the damages of the discriminatory practice.

Appeals

Human Rights Commissions usually feel strongly about fairness towards respondents and complainants. Both, therefore, have the right to appeal any decisions by an Inquiry to court. As well, they usually both have the right to be awarded costs in their favour.

Also, if a Commission dismisses a complaint, the complainant can request an Inquiry themselves to appeal the dismissal. However, in order to avoid what is called "frivolous" complaints, or complaints made in "bad faith", the Inquiry officer usually has the discretion of granting the request.

Public Education

Public Education programs are usually an important factor in Human Rights Laws. The programs include advertisements, pamphlets, posters and workshops. In other provinces the Education Officers of the Commissions go to schools showing films, and having discussions about racism and discrimination. These programs foster an understanding about human rights and thereby help avoid discrimination.

Many Commissions also offer workshops for employers who wish their employees to be aware of discrimination. The Canadian Human Rights Commission, for example, has films about sexual harassment in the workplace, and offer a workshop to promote an awareness and prevention of sexual harassment.

Public Education is considered an essential part of any human rights legislation since the purpose of anti-discrimination law is to discourage discrmination.

III. HUMAN RIGHTS LEGISLATION:

Where It Would Apply

Employment

The Human Rights Legislation would apply to all areas of employment, including recruitment, hiring, promotion, and training. An employer, therefore, could not discriminate in the areas mentioned above, on the basis of any of the "prohibited grounds" outlined in the ***White Paper***. These prohibited grounds include:

- race, ancestry, colour
- ethnic or national origin
- religion or religious creed
- marital or family status
- sex
- age
- physical or mental disability
- sexual orientation
- political belief
- criminal record

Some of these "grounds" are already presently included in our Fair Practices Act, and some of these are "new grounds".

As indicated in the ***White Paper,*** the Government of the Yukon intends to exempt services in private homes from Human Rights Legislation.

There has also been some concern that, with Human Rights Legislation, a church could not hire someone of their own faith to do religious work, or a non-profit organization set up to assist the disabled could not give preference to a disabled person when hiring.

There are two ways of handling this in Human Rights Legislation. The Canadian Human Rights Act depends upon the "bona fide occupational requirement" clause to cover these kinds of exemptions. For example, the Canadian Human Rights Commission would consider being of Catholic faith a reasonable "qualification" for working in a Catholic church on religious matters.

Many provinces, however, include a special paragraph in their Human Rights Legislation which says that "special interest" groups (groups that are charitable, social, religious, etc.) can legally give preference to members of their own group. For example, a church could discriminate ***in favour*** of someone of their own faith, or an Indian organization could give preference to hiring Indian people. Presently, the Yukon's Fair Practices Act has an overall exemption for these groups.

The Government of the Yukon intends to include a clause in the Human Rights Act, which states that these 'special interest' organizations have reasonable grounds for discriminating ***in favour*** of those people the group seeks to assist, but not ***against*** any of the other prohibited grounds. The Government also intends to allow an exemption for "family members".

Case studies show that ***other*** exemptions would be included under the "bona fide occupational requirement" clause in the Human Rights Legislation. For example, if a residential home for girls required a live-in supervisor, the sensitive nature of the employment would allow for the home to specify that the supervisor be female.

However, it would ***not*** be "bona fide" to restrict a truck driving position to men, or a typist position to women, since the qualifications for these positions have nothing to do with the person's sex.

Equal Pay For Work of Equal Value

As indicated in the White Paper, the Government intends to have *Equal Pay For Work of Equal Value* apply to the public sector immediately upon passage of the Act.

Five years past the date of passage of the Act, the *equal value pay* section will apply to private business employing fifty or more employees. Businesses affected by this section would, therefore, have five years to develop non-biased job evaluation systems and could request assistance from the Government. Employers may implement a 'pay equity' policy before that time. However, it would be mandatory that five years after the passage of the Act, all businesses of fifty or more employees have *Equal Pay For Work of Equal Value* in place.

Evaluating jobs for pay equity usually means using a point system to weigh the factors of *skill, effort, responsibility* and *working conditions.* However, the Government recognizes that there are many 'bona fide' or legitimate reasons for pay differences that are not connected to 'gender bias'. We therefore intend to include a clause similar to that used in the Canadian Human Rights Act to address this. The clause would indicate that it would not be contrary to this section to pay different people different wages because of factors such as seniority, performance rating, collective bargaining, training, red-circling, temporary market supplements or training assignments.

These factors are defined by the EQUAL WAGES GUIDELINES, of the Canadian Human Rights Act as being 'reasonable' when they are applied equally and consistently to both men and women.

"Collective bargaining" refers to when two unions in the same establishment negotiate different wage structures compared to each other, but which are evaluated equitably within each union. "Red-circling" refers to a practice of re-evaluating a job which results in a wage being temporarily 'fixed' to allow other wages to catch up. A "temporary market supplement" refers to an internal labour shortage in a particular job classification, which *temporarily* forces the wages higher. A "training assignment" refers to when a person is removed from their regular duties to train another and is given a temporary wage supplement.

It is important to reaffirm that sex does *not* constitute a reasonable factor for justifying a difference in wages.

Throughout the five year time span, the Government is prepared to negotiate with employers concerning what constitutes fifty employees, (i.e. part-time, full-time, seasonal, etc.)

Accommodation & Contracts

The Government of the Yukon intends for a Human Rights Act to apply to residential and commercial accommodation, and to contracts.

This means that a person could not be refused an apartment because of the prohibited grounds, but could be if there was reasonable cause. 'Reasonable causes' in other Human Rights Laws include single sex dwellings, or housing set aside specially for the elderly, or where the cost of making the apartment accessible to the handicapped would be too expensive to the owner.

A person who was leasing an apartment could not discriminate because of the renter's race, or religion, or any other of the prohibited grounds. But, a landlord could refuse to lease to someone who could not provide references, or if they wished to rent to a non-smoker because of insurance reasons, since neither of these are prohibited grounds.

The Human Rights Act would also prohibit discrimination in the letting of contracts, or imposing different terms in a contract because of any of the prohibited grounds, unless there is a valid reason. (For example, differences in insurance premiums, because of proven differences in the risk factor, would be considered a valid reason).

Regulations & Laws

Every legislation, once passed, needs to be regulated. The regulations for the Human Rights Legislation would set out detailed rules governing complaint forms and Inquiry procedures, for example, so that they are legal documents.

The legislation would also be binding to the Government of the Yukon and every agency of the Government. The Human Rights Act would take precedence over every other law, unless that law expressly declares an exemption (as would be the case with age restrictions on driving, or drinking).

CONCLUSION

The Government of the Yukon believes that we need to develop a system for implementing human rights legislation that is fair and effective. We believe the system must work *for* the Yukon and its citizens. This means that we need your input.

Since the *White Paper* was released in July of this year, the discussions have focussed on the principles of human rights. There seems to be widespread support for these principles. Most people have agreed that discrimination is a problem in the Yukon, and most people agree that this is unfortunate.

The next question, then, is how do we handle it? How do we implement these principles in ways that are workable and effective? We need to develop a system that is fair to employers, but not at the cost to the victim. We need a system that is reasonable, but still addresses the very real needs of our citizens.

We urge you to help us develop this system. Through discussion and co-operation we can develop an implementation process that is designed to work in the Yukon, for Yukoners.

TUNDRA GRAPHICS